

ORDINANCE NO. _____

AN UNCODIFIED URGENCY ORDINANCE OF THE CITY OF SAN JOSE ENACTING MINIMUM LABOR STANDARDS FOR THE REEMPLOYMENT OF CERTAIN WORKERS WHO WERE LAID OFF DUE TO THE ECONOMIC IMPACTS OF THE COVID-19 PANDEMIC

WHEREAS, the City Council adopts this urgency Ordinance for the reasons set forth in the staff memorandum from the City Attorney dated April 9, 2021 (“CAO Memorandum”) and the Rules Committee memorandum from Councilmembers Peralez, Jimenez, and Cohen dated March 18, 2021 (“Rules Committee Memorandum”); and

WHEREAS, Section 606 of the City Charter does not require codification of this ordinance because it is temporary and, therefore, not a general ordinance in force; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code, the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Title of Ordinance

This Ordinance will be known as the “Hospitality and Travel Worker Return Together Ordinance.”

SECTION 2. Authority

This Ordinance is a minimum labor standard adopted based on the City’s powers granted by Article XI, Section 7 of the California Constitution. The enactment of this Ordinance is intended to be an exercise of the City's general police powers to protect the health, safety, and welfare as those powers are set forth in State and Federal law.

SECTION 3. Urgency

- A. Urgency Measure. In accordance with Section 605 of the City Charter, this Ordinance is adopted as an urgency measure necessary for the immediate preservation of the public peace, health and safety.

- B. Urgency Facts. The facts constituting the urgency are set forth in the section of the CAO Memorandum entitled “Statement of Urgency” and in the Rules Committee Memorandum. Those facts are incorporated herein and adopted by Council. Those facts demonstrate this Ordinance must be effective immediately to guarantee that the maximum number of workers have the right to an offer of reemployment as mandated by the Ordinance.

SECTION 4. Effective Dates

- A. Start Date: This urgency Ordinance is effective on the date of its adoption.

- B. Sunset Provision: This Ordinance will remain effective until one (1) year from the Start Date and as of that date is repealed unless the City Council enacts an ordinance extending the date.

SECTION 5. Definitions

The following definitions govern the meaning of this Ordinance along with the definitions in Section 1.04.020 of the San José Municipal Code.

- A. “Business Day” means any weekday, Monday through Friday, excepting any day that is a local, state or federal holiday.
- B. “Calendar Day” means any day of the week, including Saturdays, Sundays and holidays.
- C. “Covered Employer” means any Person, other than a public entity or air carrier certificated by the Federal Aviation Administration, who owns or operates a business that is in the City and that is engaged in any of the following activities.
1. Airport Hospitality Business. The business provides food and beverage, retail, or other consumer goods or services to the public at the Norman Y. Mineta San José International Airport.
 2. Airport Services Business. The business contracts with a passenger air carrier to provide either of the following:
 - a. Services involving food and beverage catering, or

- b. Services, on the property of the Norman Y. Mineta San José International Airport, directly related to the air transportation of people, property, or mail, including but not limited to the loading and unloading of property on aircraft, assistance to passengers under the federal regulation at 14 C.F.R. Part 382, security, airport ticketing and check-in functions, ground-handling of aircraft, or aircraft cleaning and sanitization functions and waste removal.
3. Event Center Business. The business does either of the following:
 - a. Operates an event center that is used for public performances (such as a concert hall, stadium, sports arena, racetrack, coliseum, convention center or similar structure) and has more than fifty thousand (50,000) square feet or five thousand (5,000) seats, or
 - b. Contracts, or leases or sublets space, to provide services related to the event center's purpose, including food and beverage, concessions, retail stores, bars, and structured parking facilities.
4. Food Service Business. The business contracts, or subcontracts with another business, to provide on-site food services for a term of at least three (3) months at any commercial, industrial, institutional or mixed-use business facility in the City in a single building or in contiguous buildings under common ownership or management. If the business subcontracts to provide such services, the subcontract must be more than twenty-five thousand dollars (\$25,000.00).
5. Hotel Service Business. The business does either of the following:

- a. Operates a building designated or used for lodging, containing fifty (50) or more guest rooms and providing other related services for the public, including but not limited to food and beverage preparation and service, meetings, tradeshow and conventions, or
 - b. Contracts, or leases or sublets space, to provide services at the lodging or related to the lodging's purpose, including food and beverage, concessions, retail stores, bars, and structured parking facilities.
- D. "Eligible Worker" means a worker meeting each of the following requirements.
- 1. The worker was employed by a Covered Employer for six (6) months or more in the twelve (12) months immediately before March 4, 2020.
 - 2. The worker was not employed by the Covered Employer as a supervisor, manager or confidential employee.
 - 3. The Covered Employer laid the worker off after March 4, 2020 due to a lack of business, a reduction in force or other economic, non-disciplinary reasons, resulting from a government state of emergency declared, or any shelter in place orders issued, in response to the novel coronavirus COVID-19. This requirement includes any layoff by a Covered Employer done in conjunction with the closure or cessation of the Covered Employer's business operations in the City.
- E. "Family Care Hardship" means a circumstance in which an Eligible Worker is unable to work due to any reason for which an employee may use paid sick leave to provide care for another person, including but not limited to a need to care for

a child whose school or place of care has been closed or whose childcare provider is unavailable as a result of the COVID-19 public health emergency and no other suitable person is available to care for the child during the period of such leave. For the purpose of this definition, "child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under eighteen (18) years of age or who is incapable of self-care because of a mental or physical disability.

SECTION 6. Offer of Reemployment

- A. **General Requirement and Form of Offer.** A Covered Employer must engage in good faith efforts to notify an Eligible Worker by phone and email of a reemployment offer. If the Covered Employer does not have phone or email contact information or is unable to make contact by those means, it must attempt to make contact by certified mail or courier delivery.
1. **By Phone:** If a Covered Employer has a record of an Eligible Worker's last known phone number, it must attempt to notify the Eligible Worker of a reemployment offer at that number. The Covered Employer must notify the Eligible Worker that: (1) it wishes to extend an offer of reemployment; and (2) it seeks the eligible worker's consent to transmit a written offer by email.
 2. **By Email:** If a Covered Employer has a record of the Eligible Worker's last known email address, it must attempt to notify the Eligible Worker of the reemployment offer by email. The Covered Employer must notify the Eligible Worker that: (1) it wishes to extend reemployment offer; and (2) it seeks the Eligible Worker's consent to transmit a reemployment offer by email.

3. **Eligible Worker Consent to Offer by Phone or Email:** An Eligible Worker must provide confirmation of consent by text message or email by 5 p.m. PST by the Business Day immediately following the contact date. The Covered Employer must transmit the reemployment offer by 5 p.m. PST of the first Business Day following receipt of consent. If the Eligible Worker does not give timely consent to transmit the reemployment offer by email, the Covered Employer must transmit a reemployment offer to the Eligible Worker's last known address by certified mail or courier delivery. A courier may deliver the reemployment offer without obtaining proof of receipt by the Eligible Worker.
 4. **Time for Response/Eligible Worker Response:** If delivered by email, the reemployment offer must remain open for at least five (5) Business Days following receipt. If delivered by certified mail, the reemployment offer must remain open for at least five (5) Business Days from the postmark date. Unless the Covered Employer and the Eligible Worker have otherwise agreed to extend the response period, if an Eligible Worker fails to respond to an offer within the applicable timeframe, the Eligible Worker will be deemed to have rejected the offer and the Covered Employer may then offer the position to the next most senior Eligible Worker or, if there are no alternative Eligible Workers, then to an alternative job candidate.
- B. Offer of Reemployment to Same Job. If, after the effective date of this Ordinance, the Covered Employer seeks to hire someone to a position formerly held by an Eligible Worker, the Covered Employer must offer the position to the Eligible Worker before offering the position to someone else and before offering the Eligible Worker a substantially similar position in accordance with Paragraph C of this Section 6.

- C. Offer of Reemployment to *Similar Job*. If, after the effective date of this Ordinance, the Covered Employer seeks to hire someone to a position that is substantially similar to an Eligible Worker's former position, the Covered Employer must offer the substantially similar position to the Eligible Worker before offering the position to someone else. A substantially similar position is one that includes any of the following:
1. A position with comparable job duties, pay, benefits, and working conditions to the Eligible Worker's former position,
 2. Any position in which the Eligible Worker worked for the Covered Employer in the twelve (12) months preceding the layoff of the Eligible Worker, or
 3. Any position for which the Eligible Worker would be qualified, including a position that would necessitate training that the Covered Employer would otherwise make available to a new employee to the particular position upon hire.
- D. Multiple Eligible Workers. If the Covered Employer laid off more than one (1) Eligible Worker from the same job classification, the Covered Employer must make offers of reemployment to such Eligible Workers based on their former seniority with the Covered Employer. Seniority is based on an Eligible Worker's earliest date of hire with the Covered Employer.
- E. Simultaneous Offers. A Covered Employer may make simultaneous, conditional offers of reemployment to Eligible Workers, provided the Covered Employer must reemploy Eligible Workers in accordance with the priorities in this Section 6.

- F. Non-Discrimination and Duty to Reasonably Accommodate Eligible Workers Experiencing a Family Care Hardship. A Covered Employer shall not discriminate against or take an adverse employment action against an Eligible Worker as a consequence of an Eligible Worker experiencing a Family Care Hardship. An Eligible Worker shall be entitled to reasonable accommodation of a job duty or job requirement if a Family Care Hardship impacts the Eligible Worker's ability to perform a job duty or to satisfy a job requirement. A Covered Employer shall, in response to a request for accommodation by an Eligible Worker, make good faith efforts to reasonably accommodate an Eligible Worker during the period in which an Eligible Worker experiences a Family Care Hardship. For the purpose of this Paragraph F, to "reasonably accommodate" includes, without limitation, modifying an Eligible Worker's schedule, delaying the start date of reemployment, modifying the number of hours to be worked, or permitting telework, to the extent operationally feasible, to accommodate the Eligible Worker's Family Care Hardship

SECTION 7. Grounds for Not Offering Reemployment

- A. Misconduct. A Covered Employer does not have to offer reemployment to an otherwise Eligible Worker if the Covered Employer learns, after the Eligible Worker's layoff, that the Eligible Worker engaged in an act of dishonesty, violated the law, violated a policy or rule of the Covered Employer, or engaged in other misconduct during the Eligible Worker's employment with the Covered Employer.
- B. Severance Agreement. A Covered Employer does not have to offer reemployment to an otherwise Eligible Worker if, before the effective date of this Ordinance and as part of the layoff, the Covered Employer and the Eligible Worker executed a severance agreement in which the Eligible Worker, in

exchange for adequate consideration, gave a general release of claims against the Covered Employer.

- C. New Worker Already Hired. A Covered Employer does not have to offer reemployment to an Eligible Worker if, before the effective date of this Ordinance, the Covered Employer already hired another worker to fill the Eligible Worker's former position or to a substantially similar position.

- D. Requirement to Provide Written Notice. If a Covered Employer does not offer reemployment to an otherwise Eligible Worker based on any of the grounds in this Section 7, the Covered Employer must provide the Eligible Worker with a written notice identifying the reason(s) for the Covered Employer's decision. The Covered Employer must provide the written notice within twenty (20) Business Days of hiring someone for the position for which the Eligible Worker otherwise would have been qualified.

SECTION 8. Changes in Covered Employer

- A. Change in Business Form. The requirements of this Ordinance continue to apply to a Covered Employer that changes the legal business form of its organization after March 4, 2020 but continues to conduct the same or similar business operations.

- B. Change in Business Location. The requirements of this Ordinance continue to apply to a Covered Employer that relocates its operations to a different location in the City after March 4, 2020 but continues to conduct the same or similar operations.

- C. Change in Ownership. If, after a Covered Employer lays off an Eligible Worker, the Covered Employer sells, assigns, transfers, contributes or otherwise disposes of all or substantially all of its assets or a controlling interest (including by consolidation or merger) of its operations to a new Covered Employer, the new Covered Employer must comply with the requirements of this Ordinance. Notwithstanding the preceding the requirements of this Ordinance do not apply to a Covered Employer that after March 4, 2020: (i) ceased and has not resumed or relocated its operations in the City of San Jose; (ii) filed a voluntary petition of bankruptcy; or (iii) was made subject to the institution of bankruptcy proceedings or the adjudication of the Covered Employer as a bankrupt under federal bankruptcy laws.

SECTION 9. Enforcement

- A. Civil Action. An Eligible Worker or the City can bring a civil action in the Superior Court of the State of California against a Covered Employer for violations of this Ordinance only after the following requirements have been met:
1. The Eligible Worker provides written notice to the Covered Employer of the provisions of this Ordinance alleged to have been violated and the facts to support the alleged violation; and
 2. The Covered Employer is provided fifteen (15) Business Days from receipt of the written notice to cure any such alleged violation.
- B. Rebuttable Presumption of a Violation. A rebuttable presumption arises that a Covered Employer violated this Ordinance if:

1. The Eligible Worker alleges in good faith that the Covered Employer violated this Ordinance, and
2. The Eligible Worker is not currently employed by the Covered Employer.

C. Remedies for Violation: If the court finds that a Covered Employer has violated this Ordinance, the court can award any of the following as appropriate.

1. Reinstatement to the Eligible Worker's former position or a substantially similar position.
2. Actual damages, including back pay, for each day in which the Covered Employer was in violation of this Ordinance, or a total of One Thousand Dollars (\$1,000), whichever is greater. Back pay will include the value of benefits and will be calculated at a rate of compensation per day not less than the higher of:
 - a. The average regular rate of pay received by the Eligible Worker, during the last six (6) months of the worker's employment, times the average hours worked per workday by the worker during the last six (6) months of the worker's employment in that job classification; or
 - b. The final regular rate of pay received by the Eligible Worker at the time of the layoff times the average hours worked per work day by the worker during the last six (6) months of the worker's employment in that job classification.
3. The Court will award reasonable attorneys' fees and costs to: (a) an Eligible Worker who prevails in an action to enforce this Ordinance; or (b)

a Covered Employer who prevails where the court also determines that the Eligible Worker's action was frivolous.

- D. No Limitation on Other Remedies. This Ordinance does not limit the rights and remedies that the law otherwise provides to Eligible Workers, including without limitation, the rights to be free from wrongful termination and unlawful discrimination. This Ordinance does not limit a discharged Eligible Employee's right to bring a common law cause of action for wrongful termination. Notwithstanding the preceding, no criminal penalties will attach for violation of this Ordinance.

SECTION 10. Retaliatory Action Prohibited

- A. Prohibition. A Covered Employer cannot take any adverse employment action against an Eligible Worker who exercises a right the Eligible Worker has under this Ordinance. Adverse employment action includes any of the following: refusing to employ, terminating, demoting, reducing compensation or hours, or giving the employee undesirable shifts. This prohibition applies to any Eligible Worker who mistakenly, but in good faith, alleges noncompliance with this Ordinance.
- B. Rebuttable Presumption of a Violation. A rebuttable presumption arises that a Covered Employer took adverse employment action against an Eligible Worker in violation of this Section 10 if:
1. The Eligible Worker exercises a right the Eligible Worker has under this Ordinance or alleged in good faith that the Covered Employer violated this Ordinance, and

2. The Covered Employer took an adverse employment action against the Eligible Worker within sixty (60) Calendar Days of the Eligible Worker exercising such right or alleging such violation.

SECTION 11. Minimum Labor Standard

This Ordinance is a minimum labor standard. It does not prevent the establishment of more expansive labor standards through statute, ordinance, resolution, or contract.

SECTION 12. Waiver Through Collective Bargaining Agreement

All of the provisions of this Ordinance, or any part of this Ordinance, may be waived in a bona fide collective bargaining agreement, but only if the waiver is expressly set forth in that agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of any part of the provisions of this Ordinance.

SECTION 13. Severability

If a court of competent jurisdiction invalidates, for any reason, any subsection, sentence, clause or phrase of this Ordinance, such decision does not affect the validity of the remaining portions of this Ordinance and the remaining portion will remain in full force and effect. The City Council declares that it would have adopted this Ordinance and every subsection, sentence, clause and phrase thereof not declared invalid, without regard to whether any portion of the Ordinance would be subsequently declared invalid or unconstitutional. The City Council hereby authorizes the court to reform the provisions of this Ordinance in order to preserve the maximum permissible effect of each subsection herein.

ADOPTED IN ACCORDANCE WITH CHARTER SECTION 605(d) this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk